Supreme Court, U.S.
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No. 92-752

In the Supreme Court of the United States

OCTOBER TERM, 1992

A. LEONARD VARAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury on the defense of withdrawal from a conspiracy.

2. Whether the evidence was sufficient to convict petitioner of mail fraud and securities fraud.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Hyde v. *United States*, 225 U.S. 347 (1912)	6
Martin v. *Ohio*, 480 U.S. 228 (1987)	7
Medina v. *California*, 112 S. Ct. 2572 (1972)	7
United States v. *Bafia*, 949 F.2d 1465 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992)	8
United States v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965)	6, 7
United States v. *Branch*, 850 F.2d 1080 (5th Cir. 1988), cert. denied, 488 U.S. 1019 (1989)	6
United States v. *Dorn*, 561 F.2d 1252 (7th Cir. 1977)	6
United States v. *Dyer*, 821 F.2d 35 (1st Cir. 1987)	6
United States v. *Finestone*, 816 F.2d 583 (11th Cir.), cert. denied, 484 U.S. 948 (1987)	6
United States v. *Gillen*, 599 F.2d 541 (3d Cir.), cert. denied, 444 U.S. 866 (1979)	6
United States v. *Granados*, 962 F.2d 767 (8th Cir. 1992)	6
United States v. *Lash*, 937 F.2d 1077 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991)	6
United States v. *LeQuire*, 943 F.2d 1554 (11th Cir. 1991), cert. denied, 112 S. Ct. 3037 (1992)	8
United States v. *Maze*, 414 U.S. 395 (1974)	9
United States v. *Patel*, 879 F.2d 292 (7th Cir. 1989), cert. denied, 494 U.S. 1016 (1990)	7, 8
United States v. *Payne*, 962 F.2d 1228 (6th Cir. 1992), cert. denied, No. 92-517 (Dec. 14, 1992)	8

Cases—Continued: Page

United States v. *Read*, 658 F.2d 1225 (7th Cir. 1981) 5, 6, 7
United States v. *Rossy*, 953 F.2d 321 (7th Cir.), cert. denied, 112 S. Ct. 1240 (1992) 7-8
United States v. *Russell*, 963 F.2d 1320 (10th Cir.), cert. denied, 113 S. Ct. 280 (1992) 6
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 5, 8

Constitution, statutes and rules:

U.S. Const. Amend. V (Due Process Clause) 6-7
15 U.S.C. 77q 2
15 U.S.C. 77x 2
18 U.S.C. 371 2
18 U.S.C. 1341 2
Fed. R. Crim. P.:
Rule 30 9
Rule 52(b) 9

Miscellaneous:

Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a11) is not reported, but the judgment is noted at 972 F.2d 357 (Table). A previous opinion of the court of appeals is reported at 952 F.2d 1181.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. The petition for a writ of certiorari was filed on October 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted on one count of conspiracy to commit mail

fraud (18 U.S.C. 371), three counts of mail fraud (18 U.S.C. 1341), and two counts of securities fraud (15 U.S.C. 77q and 77x). He was sentenced to seven years' imprisonment and fined $150,000. The court of appeals affirmed. Pet. App. a1-a11.[1]

1. The evidence at trial showed that between 1977 and 1983, Galen Ross, Michael Strand, and petitioner participated in a conspiracy to defraud investors through the use of false and misleading information. Ross was president of Classic Mining Corporation, and Strand was a significant stockholder in the company. They promoted Classic's stock on the basis of the company's ownership of mineral rights in Wyoming, and they hired petitioner, a New York stock promoter, to assist in their efforts. Pet. App. a2.

Ross, Strand, and petitioner employed various fraudulent techniques to encourage investment. For example, petitioner purchased Living Industries, a dormant shell corporation, and arranged for Classic and Living to enter into a joint venture—the Overland Dome Petroleum Company—for oil and gas exploration. The joint venture sold limited partnership interests at inflated prices for each well that was to be drilled, circulated misleading information about the drilling activities, and concealed from investors the actual drilling costs and production figures. Those fraudulent activities substantially enriched petitioner. Pet. App. a3; Gov't C.A. Br. 13-24.[2]

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[1] Petitioner was tried with co-defendants Galen J. Ross and Michael W. Strand, who were also convicted of mail fraud and conspiracy to commit mail fraud. The court of appeals affirmed their convictions. Pet. App. a8-a11.

[2] Ross, Strand, and petitioner used other misleading techniques to promote investment. For example, in 1979 Classic

By 1981, investors had become suspicious. Ross, Strand, and petitioner responded by sending several "lulling" letters. In April 1982, Ross sent a letter to Classic's shareholders announcing the drilling of a deep test well. The letter painted an optimistic picture of Classic's prospects and failed to disclose any of Classic's problems. Pet. App. a7; Gov't C.A. Br. 24-26. On July 16, 1982, petitioner sent a letter to the joint venture limited partners informing them that a class action had been filed against Strand, Ross, and others, but suggesting that neither he nor his companies had engaged in any wrongdoing. Pet. App. a7, a12-a17; Gov't C.A. Br. 28. In January 1983, after he was joined as a defendant in the class action, petitioner again wrote the limited partners. He assured them that his company was protecting the rights of the investors and urged the investors not to support the class action. The investors in fact did not provide support for the suit, and it was dismissed. Pet. App. a7; Gov't C.A. Br. 28-29.

2. Petitioner argued at trial that he withdrew from the conspiracy in September 1981. In support of that contention, he relied on testimony that purportedly showed "great hostility and no communication between Strand and petitioner from the middle

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announced to its shareholders that it had entered into a uranium mining joint venture with Fulton Investment Corporation under which Fulton would develop Classic's uranium reserves, pay all mining expenses, and extract and purchase 200,000 pounds of ore per year. The defendants failed to reveal that Classic's entire uranium claim amounted to no more than 171,000 pounds of ore or that petitioner controlled Fulton. No uranium was ever mined or sold, and Fulton never purchased any ore under the agreement. Pet. App. a2-a3; see Gov't C.A. Br. 10-12.

of 1981 until the time of trial." Pet. 16; Pet. C.A. Br. 28; but see Gov't C.A. Br. 31 n.29. The trial court charged the jury that petitioner bore the burden of establishing his withdrawal from the conspiracy, Pet. App. a5, and petitioner did not object to that instruction. Pet. 12; Gov't C.A. Br. 32.

On appeal, petitioner argued that the trial court's instruction impermissibly shifted the burden of proof to him to prove that he had withdrawn from the conspiracy. The court of appeals rejected that argument, stating that its precedents placed the burden of persuasion on the defendant. Pet. App. a5-a6. Petitioner also argued that the evidence was insufficient to support his mail fraud and securities convictions because the mailings were not lulling letters. Pet. App. a6. The court of appeals also rejected that argument, finding that Ross's April 1982 letter as well as petitioner's letters in July 1982 and January 1983 contained statements that the jury reasonably "could have construed as an attempt to lull the investors into a false sense of security and thereby to postpone investigation into the [defendants'] scheme." Pet. App. a8.

ARGUMENT

1. Petitioner challenges the court of appeals' ruling that a defendant has the burden of proving withdrawal from a conspiracy. Pet. 13-18. The courts below correctly recognized that, while the government has the burden of providing beyond a reasonable doubt every element of the conspiracy offense, a defendant seeking to avoid criminal liability has the burden of proving the affirmative defense that he withdrew from the conspiracy.

A withdrawal defense requires not only that a defendant have ceased participating in the conspiracy, but also that he either have disclosed the conspiracy to the authorities or at least have done some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators * * *." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). Even if the defense is established, it does not excuse the defendant from criminal responsibility for his prior conspiratorial acts but instead simply serves as a foundation for other defenses, such as a statute of limitations claim. See, *e.g.*, *United States Gypsum Co.*, 438 U.S. at 465 n.38.[3]

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[3] See also *United States* v. *Read*, 658 F.2d 1225, 1232-1233 (7th Cir. 1981) (withdrawing "defendant is still liable" for prior conspiratorial acts and withdrawal "becomes a complete defense only when coupled with the defense of the statute of limitations"); cf. Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957 (1959) ("[I]n those jurisdictions which have overt-act requirements, the defendant is not punishable as a member of the conspiracy if he withdraws before an overt act is committed.") (footnote omitted).

This Court has long held that a defendant who claims that he withdrew from the conspiracy must show some "affirmative action" constituting withdrawal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). In *Hyde*, the Court ruled that a defendant's participation in a conspiracy continues whether or not he performs acts in furtherance of the conspiracy and that "until he does some act to disavow or defeat the purpose he is in no situation" to assert a withdrawal defense. *Ibid.* In accordance with *Hyde*, the overwhelming majority of the courts of appeals have held that a defendant bears the burden of proving his withdrawal from a conspiracy.[4]

Petitioner argues (Pet. 13, 15) that the court of appeals' decision conflicts with the Seventh Circuit's decision in *United States* v. *Read*, 658 F.2d 1225 (1981). That court construed *Hyde* as deciding only who bears the burden of production rather than the burden of proof, and it declined to follow prior Seventh Circuit cases placing on defendants the burden of proving withdrawal. *Id.* at 1234-1236. See, *e.g.*, *United States* v. *Dorn*, 561 F.2d 1252, 1256 (7th Cir. 1977). The court reasoned that the Due

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[4] See, *e.g.*, *United States* v. *Dyer*, 821 F.2d 35, 39 & n.6 (1st Cir. 1987); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965); *United States* v. *Gillen*, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Branch*, 850 F.2d 1080, 1082-1083 (5th Cir. 1988), cert. denied, 488 U.S. 1019 (1989); *United States* v. *Lash*, 937 F.2d 1077, 1083 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991); *United States* v. *Granados*, 962 F.2d 767, 773 (8th Cir. 1992); *United States* v. *Russell*, 963 F.2d 1320, 1323 (10th Cir.), cert. denied, 113 S. Ct. 280 (1992); *United States* v. *Finestone*, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948 (1987).

Process Clause requires the government to "disprove the defense of withdrawal beyond a reasonable doubt," because withdrawal "directly negates the element of membership in the conspiracy during the period of the statute of limitations." *Read*, 658 F.2d at 1233. The court left intact, however, the rule that "the burden of going forward with evidence of withdrawal * * * remains on the defendant." *Id.* at 1236.

Since the Seventh Circuit's decision in *Read*, this Court has decided cases undermining *Read*'s suggestion that the Due Process Clause forbids placing the burden of proving withdrawal on a defendant. For example, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), this Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense. And in *Medina* v. *California*, 112 S. Ct. 2572 (1992), the Court ruled that a State may constitutionally require the defendant to bear the burden of proving incompetence. As with those other defenses, requiring a defendant to establish withdrawal does not "offend[] [any] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577.

Not only have decisions of this Court undermined *Read*'s rationale, but the Seventh Circuit itself has called that decision into question. The Seventh Circuit stated in a case decided after *Read* that " 'the burden of establishing withdrawal lies on the defendant.' " *United States* v. *Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (Posner, J.) (quoting Judge Friendly's opinion in *Borelli*, 336 F.2d at 388), cert. denied, 494 U.S. 1016 (1990). But see *United States* v.

Rossy, 953 F.2d 321, 325 (7th Cir.) (following *Read*), cert. denied, 112 S. Ct. 1240 (1992). Given the continuing intra-circuit conflict on that issue, the Seventh Circuit may be persuaded to reconsider the issue en banc. If the Seventh Circuit follows the decisions of the other circuits, it would eliminate any need for review by this Court.[5]

Even if this Court concludes that the Seventh Circuit is committed to its position in *Read* and that the circuit conflict is likely to persist, this case is not an appropriate vehicle for resolving the conflict. Petitioner based his withdrawal defense primarily on the assertion that he had terminated his working relationship with Strand and was in fact "working to defeat him." Pet. 16. But his evidence merely shows that he had a stormy relationship with Strand and that when the investors grew suspicious he placed his own financial interests before those of Strand. See Pet. 16-18. Such evidence is insufficient to show that he withdrew from the conspiracy. See *United States Gypsum Co.*, 438 U.S. at 464 (1978); *United States* v. *Bafia*, 949 F.2d 1465, 1477-1478 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992); *United States* v. *LeQuire*, 943 F.2d 1554, 1564 (11th Cir. 1991), cert. denied, 112 S. Ct. 3037 (1992); *United States* v. *Patel*, 879 F.2d at 294.

Moreover, petitioner failed to object to the instruction that placed the burden of establishing the defense of withdrawal on the defendant. He therefore waived the issue, and it can be reviewed by this

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[5] This Court recently denied a petition for a writ of certiorari in *United States* v. *Payne*, 962 F.2d 1228 (6th Cir. 1992), cert. denied, No. 92-517 (Dec. 14, 1992), which presented the same issue.

Court only if the instruction is deemed plain error. See Fed. R. Crim. P. 30, 52(b).

2. Petitioner also argues (Pet. 19-22) that the evidence was insufficient to support his conviction, because his July 1982 and January 1983 letters were not "lulling letters." Petitioner recognizes that a lulling letter in a mail fraud or securities fraud scheme is correspondence "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States* v. *Maze*, 414 U.S. 395, 403 (1974). Petitioner argues that his two letters cannot be deemed lulling letters within that definition, because they alerted the recipients to the class action lawsuit filed against Classic.

The jury resolved that factual issue against petitioner, and no reason exists for further review of its decision. As the court of appeals explained, "the mailings in dispute contain statements that *could* reasonably be construed as an attempt to lull the investors into a false sense of security and thereby to postpone investigation into the [defendants'] scheme." Pet. App. a8 (emphasis in original). The evidence taken as a whole supports the jury's finding that petitioner's letters were part of the conspiracy to defraud investors, and the court of appeals properly "refuse[d] to set aside the jury's verdict on this ground." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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